Konsortium Lebuhraya Utara-Timur (KL) Sdn Bhd v Liew Choong Kin

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(IM)(NCVC)-518–03 OF 2017
LIM YEE LAN, IDRUS HARUN JJCA AND YEOH WEE SIAM J
20 DECEMBER 2017

Civil Procedure — Election, doctrine of — Cause of action — State authority acquired landowner's land for construction of highway — Although declaration of intended acquisition of land pursuant to s 8(1) of Land Acquisition Act 1960 published in Gazette in 2005 declaration lapsed and ceased to have effect after two years because no award of compensation made — Lapsing of declaration rendered all proceedings taken in connection therewith to be of no effect — Construction of highway nevertheless proceeded in 2005 and ended four years later — Land administrator republished second declaration for acquisition of same land in 2014 and at land enquiry in 2015 awarded landowner compensation — At enquiry landowner asked for late payment charges on compensation from 2005–2015 and accepted compensation sum awarded without protest — Whether by claiming for late payment charges from 2005 landowner implicitly acknowledged that that was when his land was acquired — Whether landowner had made an election on course of action he wanted to pursue and could not thereafter renege and sue parties involved in acquisition of his land for committing trespass between same period from 2005–2015 — Whether High Court should have struck out suit for trespass under O18 r 19 of the Rules of Court 2012 and/or under its inherent jurisdiction

Part of a highway the appellant was awarded a concession to construct ran across the respondent's land ('the land'). In January 2005, the Director-General of Lands and Mines of the Federal Territory of Kuala Lumpur ('the DG') published a declaration ('the declaration') in the Federal *Gazette* pursuant to s 8 of the Land Acquisition Act 1960 ('the LAA') that the land would be acquired for the highway. In due course, a land enquiry was held but no award was made on the ground the respondent could not be located. Since no award of compensation was made within two years from the date of publication of the declaration, pursuant to s 8(4) of the LAA the declaration lapsed and ceased to be of any effect and it also rendered all acquisition proceedings taken in respect of the land pursuant to the declaration to terminate and to be of no effect. Despite that provision, the construction of the highway proceeded and it was completed in 2009. The respondent, who disputed the contention that he was not traceable for the purpose of the land enquiry (since bills for payment of quit rent for the land had been issued to him and he had paid them) claimed that when he enquired about the status of the land acquisition from the DG's office he did not receive any reply. In June 2013, the respondent wrote to the DG

A seeking compensation for the acquisition of the land. In December 2014, the DG published a second declaration for the acquisition of the land in the Federal *Gazette* pursuant to s 8(1) of the LAA and conducted a second land enquiry in May 2015. This time around, the respondent attended the enquiry and, using the support of a land valuation report, claimed RM1,120,000 as B compensation for the land based on its value in 2014. He also claimed an additional RM568,512 as late payment charges on the compensation for the ten years between 2005 and 2015. The DG awarded the respondent a global sum of RM1,116,000 which the respondent accepted without protest. Subsequently, he sued the DG, the Lembaga Lebuhraya Malaysia and the C appellant in the High Court for a declaration that they had committed trespass on the land during the 2005–2015 period and sought damages and mesne profits against them for the trespass. Vide encl 45, the appellant applied to strike out the respondent's claim under O 18 r 19(1)(b) and (d) of the Rules of Court 2012 on the basis the suit was unsustainable, frivolous, vexatious, D scandalous and an abuse of process of court. The High Court dismissed encl 45 holding that the issues raised in the respondent's claim merited a trial because it concerned an allegation of trespass that had occurred before the land had been properly acquired in law. The instant appeal was against that decision.

E **Held,** allowing the appeal, setting aside the decision of the High Court and allowing encl 45:

(1) The acquisition of the land was made pursuant to the exercise of statutory power by the state authority in 2005. The construction of the highway F commenced after the acquisition of the land in 2005 and it was completed in 2009. Part of the highway ran across the respondent's land. Thus, any entry onto the land by the appellant was in exercise of its statutory right pursuant to the acquisition. The appellant could not therefore be said to have trespassed on the land (see para 22).

G (2) By claiming for late payment charges at 8%pa on the compensation sum from 2005 until 2015 at the second land enquiry, the respondent took the position that the acquisition of the land was in 2005. He had made a claim for late payment charges for the ten year time frame at the second land enquiry. His claim for trespass fell squarely within that same ten year H period. The respondent's action, without doubt, suffered from a multiplicity of claims. Having made a choice at the second land enquiry, the respondent had made an election from which position he could not be allowed to abandon. He had taken a benefit arising out of a course of conduct which he had pursued earlier. His subsequent conduct was I inconsistent with his election. When the respondent wrote to the DG seeking compensation, he made no mention of trespass or of reserving his rights to a claim of trespass. Having chosen his course of action, the respondent was precluded from pursuing the other course of action on the application of the principle that he could not approbate and

reprobate. His suit was clearly an abuse of process of court. He had no justification to sue for trespass in view of his subsequent conduct which was glaringly inconsistent with his earlier election. The High Court failed to consider that the respondent's claim for trespass and the claim he had already made at the second land enquiry arose from the same facts and that the respondent was making an overlapping claim for the same ten-year period (see paras 19, 21, 23, 25–26 & 28).

(3) As the respondent had accepted unconditionally and without protest the compensation awarded at the second land enquiry, clearly, with regard to the question of compensation, finality had been reached by the respondent's own choice. If he was aggrieved with the award he should have proceeded under ss 30, 37 and 38 of the LAA to have the matter referred to the court for determination. But since he did not pursue that course of action, the remedy sought for in the respondent's trespass action was not open to him. It was plainly misconceived and the court had no jurisdiction to entertain the action. The respondent's claim for trespass was unsustainable (see paras 15, 18–19 & 21).

(4) The respondent's claim in the trespass action could have led to a situation of unjust enrichment. The respondent's valuation report stated very clearly that the date of the acquisition was in 2005 which was a clear admission that the respondent had taken 2005 as the date of the acquisition of the land. The valuation of the land in the respondent's valuation report was grossly higher than what he would have received in 2005. The compensation that was awarded to him was significantly and substantially more than the sum he would have been awarded based on his own valuation report which was RM301,280 based on the value of RM538 per sqmt. The respondent had already received more than what was legally due under the LAA (see para 24).

[Bahasa Malaysia summary

Bahagian lebuh raya perayu telah diawardkan konsesi untuk membina di seluruh tanah responden ('tanah'). Pada Januari 2005, Ketua Pengarah Tanah dan Galian Wilayah Persekutuan Kuala Lumpur ('DG') telah menerbitkan perisytiharan ('perisytiharan') dalam *Warta* Persekutuan menurut s 8 Akta Pengambilan Tanah 1960 ('Akta') bahawa tanah tersebut akan diperolehi untuk lebuh raya itu. Pada masa yang sama, inkuiri tanah dijalankan tetapi tiada award dibuat atas alasan responden tidak dapat dikesan. Memandangkan tiada berian pampasan dibuat dalam masa dua tahun dari tarikh penerbitan perisytiharan itu, menurut s 8(4) Akta, perisytiharan tersebut telah luput dan tidak lagi berkuat kuasa dan menjadikan semua prosiding pemerolehan yang diambil berkenaan dengan tanah itu menurut perisytiharan untuk menamatkan dan tidak berkuat kuasa. Walaupun peruntukan itu, pembinaan lebuh raya itu dijalankan dan selesai pada tahun 2009. Responden mempertikaikan bahawa dia tidak dapat dikesan bagi tujuan inkuiri tanah

(kerana bil-bil untuk bayaran sewa tanah dikeluarkan kepadanya dan dia membayar kesemuanya) mendakwa bahawa apabila dia menanyakan pada pejabat DG tentang status pengambilan tanah, dia tidak menerima sebarang balasan. Pada bulan Jun 2013, responden menulis kepada DG mendapatkan pampasan bagi pemerolehan tanah itu. Pada bulan Disember 2014, DG menerbitkan perisytiharan kedua bagi pengambil alihan tanah dalam *Warta* Persekutuan di bawah s 8 Akta dan menjalankan siasatan tanah kedua pada Mei 2015. Kali ini, responden menghadiri siasatan dan, dengan sokongan laporan penilaian tanah, menuntut RM1,120,000 sebagai pampasan bagi tanah berdasarkan nilainya pada tahun 2014. Beliau juga menuntut tambahan sebanyak RM568,512 sebagai bayaran lewat atas pampasan untuk sepuluh tahun antara tahun 2005 dan 2015. DG menganugerahkan responden sejumlah wang sebanyak RM1,116,000 yang diterima oleh responden tanpa protes. Seterusnya, beliau menyaman DG, Lembaga Lebuhraya Malaysia dan perayu di Mahkamah Tinggi atas pengisytiharan bahawa mereka telah melakukan pencerobohan di atas tanah semasa tempoh 2005–2015 dan memohon ganti rugi dan keuntungan mesne terhadap mereka kerana kesalahan itu. Melalui lampiran 45, perayu memohon membatalkan tuntutan responden di bawah A 18 k 19(1)(b) dan (d) Kaedah-Kaedah Mahkamah 2012 berasaskan saman itu tidak boleh dikekalkan, remeh, menyakitkan hati, bersifat skandal dan penyalahgunaan proses pengadilan. Mahkamah Tinggi menolak lampiran 45 dan memutuskan isu-isu yang dibangkitkan dalam tuntutan responden merugikan perbicaraan kerana berkenaan dengan pertuduhan pelanggaran yang berlaku sebelum tanah itu telah diperoleh dengan betul bawah undang-undang. Rayuan ini adalah terhadap keputusan tersebut.

Diputuskan, membenarkan rayuan itu, mengetepikan keputusan Mahkamah Tinggi dan membenarkan lampiran 45:

(1) Pengambilan tanah dibuat menurut kuasa statutori oleh pihak berkuasa negeri pada tahun 2005. Pembinaan lebuh raya bermula selepas pemerolehan tanah itu pada tahun 2005 dan telah siap pada tahun 2009. Sebahagian lebuh raya berada di seluruh tanah responden. Oleh itu, apa-apa kemasukan tanah oleh perayu adalah menjalankan hak berkanunnya selaras dengan pemerolehan itu. Oleh itu, perayu tidak boleh dikatakan telah mencerobohi tanah tersebut (lihat perenggan 22).

(2) Dengan menuntut bayaran lewat lewat pada kadar 8% setahun atas jumlah pampasan dari tahun 2005–2015 pada penyiasatan tanah kedua, responden mengambil kedudukan bahawa pemerolehan tanah itu dibuat pada tahun 2005. Dia telah membuat tuntutan untuk lewat caj bayaran untuk tempoh masa sepuluh tahun di penyiasatan tanah kedua. Tuntutannya bagi pencerobohan jatuh di bawah tempoh sepuluh tahun yang sama. Tindakan responden, tanpa keraguan, adalah tuntutan berganda. Setelah membuat pilihan semasa inkuiri tanah kedua,

responden telah memilih dalam posisi mana dia tidak boleh dibenarkan meninggalkannya. Dia mengambil manfaat yang timbul dari suatu tindakan yang dilakukannya sebelum ini. Tingkah laku seterusnya adalah tidak konsisten dengan pemilihannya. Apabila responden menulis kepada DG menuntut pampasan, dia tidak menyebutkan pencerobohan atau menuntut haknya untuk tuntutan pelanggaran. Setelah memilih tindakannya, responden dihalang daripada mengejar tindakan lain mengenai pemakaian prinsip bahawa dia tidak dapat meluluskan dan menyangkal. Samannya jelas merupakan penyalahgunaan proses mahkamah. Dia tidak mempunyai alasan mendakwa kerana melakukan perbuatannya yang tidak sepadan dengan pilihan raya terdahulu. Mahkamah Tinggi gagal mempertimbangkan bahawa tuntutan responden untuk pencerobohan dan tuntutan yang telah dibuatnya pada inkuiri tanah kedua timbul dari fakta yang sama dan bahawa responden membuat tuntutan bertindih untuk tempoh sepuluh tahun yang sama (lihat perenggan 19, 21, 23, 25–26 & 28).

(3) Oleh kerana responden telah menerima tanpa syarat dan tanpa memprotes pampasan yang diberikan semasa inkuiri tanah kedua, dengan jelas, berkenaan dengan persoalan pampasan, kesudahan telah dicapai melalui pilihan responden sendiri. Sekiranya dia terkilan dengan award tersebut, dia sepatutnya meneruskan di bawah ss 30, 37 dan 38 Akta untuk merujuk perkara tersebut pada mahkamah untuk diputuskan. Oleh kerana dia tidak meneruskan tindakan itu, remedi yang dipohon dalam tindakan pelanggaran responden tidak terbuka buatnya. Jelas tidak difahami dan mahkamah tidak mempunyai bidang kuasa untuk melayan tindakan ini. Tuntutan responden untuk pencerobohan tidak boleh kekal (lihat perenggan 15, 18–19 & 21).

(4) Tuntutan responden dalam tindakan pencerobohan boleh membawa kepada keadaan pengkayaan tidak adil. Laporan penilaian responden menyatakan dengan jelas bahawa tempoh pemerolehan itu pada tahun 2005 yang merupakan pengakuan yang jelas bahwa responden telah mengambil tahun 2005 sebagai tarikh pengambilan tanah tersebut. Penilaian tanah dalam laporan penilaian responden adalah lebih tinggi daripada apa yang dia akan terima pada tahun 2005. Pampasan yang diberi kepadanya adalah dengan ketara dan lebih banyak daripada jumlah yang akan di awardkan berdasarkan laporan penilaian sendiri yang RM301,280 berdasarkan nilai RM538 setiap meter persegi. Responden telah menerima lebih daripada apa yang sah di bawah LAA (lihat perenggan 24).]

Notes

For a case on cause of action, see 2(2) *Mallal's Digest* (5th Ed, 2017 Reissue) para 3606.

Cases referred to

Gabriel Peter & Partners (suing as a firm) v Wee Chong Jin & Ors [1998] 1 SLR 374, CA (refd)
Kelana Megah Development Sdn Bhd v Kerajaan Negeri Johor and another appeal [2016] MLJU 1649; [2016] 8 CLJ 804, CA (refd)
Land Executive Committee of Federal Territory v Syarikat Harper Gilfillan Berhad [1981] 1 MLJ 234, FC (refd)
Lee Nyan Choi v Voon Noon [1979] 2 MLJ 28, FC (refd)
Lembaga Lebuhraya Malaysia v Cahaya Baru Development Bhd [2009] 5 MLJ 14; [2010] 4 CLJ 419, CA (refd)
Lokmanaal Hakim Ramli & Ors v Hj Ismail Ishak & Ors [1992] MLJU 110; [1992] 2 CLJ Rep 795, HC (refd)
Manggai v Government of Sarawak & Anor [1970] 2 MLJ 41, FC (refd)
Metal Industry Employees Union v Registrar of Trade Unions & Ors [1976] 1 MLJ 220, FC (refd)
Ng Chee Keong & Ors v Lembaga Letrik Negara & Anor [1990] MLJU 7; [1991] 3 CLJ Rep 323, HC (folld)
Pasmore and others v The Oswaldtwistle Urban District Council [1898] AC 387, HL (refd)
Raja Zainal Abidin bin Raja Haji Tachik & Ors v British-American Life & General Insurance Bhd [1993] 3 MLJ 16, SC (refd)
Tan Yoke Kwee & Ors v Sistem Lingkaran Lebuhraya Sdn Bhd & Ors [2009] MLJU 215; [2010] 2 CLJ 653, HC (refd)
Wilkinson v Barking Corporation [1948] 1 KB 721, CA (refd)

Legislation referred to

Land Acquisition Act 1960 ss 8, 8(1), (4), 10, 14(a), 30, 30(a), (b), 32(1), 36, 37, 37(1)(b), 38, 48, Forms E, H, N
National Land Code s 418
Rules of Court 2012 O 18 r 19, O 18 r 19(1)(b), (1)(d)
Small Estates (Distribution) Act 1955 s 29(a)

Appeal from: Civil Suit No 21NCVC-85–12 of 2015 (High Court, Kuala Lumpur)

R Jayasingam (Ng Keng Yang with him) (BH Lawrence & Co) for the appellant.
Liew Choong Kin (Tan Norizan & Assoc) for the respondent.

Idrus Harun JCA (delivering judgment of the court):

[1] In this action, the respondent claims against the appellant and two other defendants principally for damages as well as mesne profit for trespass allegedly committed by the appellant and the said two defendants and a declaration that they had trespassed into the respondent's land. The appellant, on 2 December 2016, filed an application in encl 45 seeking mainly an order to strike out the

amended statement of claim dated 17 February 2016 pursuant to O 18 r 19(1)(b) and (d) of the Rules of Court 2012. The application was dismissed by the High Court by an order dated 16 February 2017. This is an appeal by the appellant against the said decision in which the appellant's application was dismissed.

[2] Before we embark upon a detailed consideration of the appeal, there is a preliminary matter which we ought to mention at the outset. Besides the appellant, who was the third defendant in the present action in the High Court, the second defendant had also filed a similar application in encl 47 which was heard and dismissed on the same day by the learned judge. The second defendant filed a separate appeal against the High Court's decision. It is also worthy of mention that no such similar application was filed by the first defendant to strike out the respondent's claim.

[3] The facts that can be discerned from the respondent's pleadings reveal that the appellant was awarded a concession to construct a highway known as Lebuhraya Duta–Ulu Kelang or DUKE Highway ('the highway'). The respondent was the then landowner of a piece of property described as Lot 259, Hot Spring New Village, Mukim Setapak ('the subject land') that was acquired for the construction of the highway in 2005. The subject land has an area of 558 sqmt. The first defendant commenced land acquisition proceedings when on 20 January 2005 it published a Federal *Gazette* No 365 (exh CSK2) pursuant to s 8 of the Land Acquisition Act 1960 ('the Act'). In Form E dated 30 March 2005 which was issued by the first defendant under s 10 of the Act after the publication of the said *Gazette*, it was stated that the subject land was deemed 'Hakmilik Tidak Dapat Dikesan'. A land acquisition enquiry (the first enquiry) was conducted in 2005. But no award was made to the respondent.

[4] Under s 8(4) of the Act, a declaration under sub-s (1) shall lapse and cease to be of any effect on the expiry of two years after the date of its publication in the *Gazette* if the land administrator has not made an award under s 14(a) within the said period of two years and all proceedings already taken or being taken in respect of the subject property in consequence of such declaration shall terminate and be of no effect. The highway, part of which undisputedly runs across the subject land, was thereafter constructed and completed in 2009. The respondent pleaded that it did not make sense that the first defendant could not trace the respondent when in actual fact it had issued bills for quit rent to him and all receipts for payment thereof were issued in his name. Nevertheless, the respondent was not paid any compensation and when he wrote to the first defendant to enquire about the status of the acquisition of the subject land, he did not receive any feedback from the first defendant.

[5] Thus on 21 June 2013, the respondent issued a letter to the first

A defendant seeking compensation based on current market value or value agreed by a licensed valuer (exh CSK7). However, the first defendant commenced a second land acquisition proceeding vide a Federal *Gazette* No 4244 dated 1 December 2014 (exh CSK3) and conducted a second enquiry ('the second enquiry'). The respondent this time around attended the second enquiry which B was held on 25 May 2015 and submitted his land valuation report (exh CSK6). The first defendant awarded a sum of RM1,116,000 for the acquisition of the subject land, which award the respondent accepted without protest (exh LCK2). Thereafter, however, the respondent proceeded to file the present action for trespass for the period between 2005–2015. C

[6] The learned judge in dismissing the appellant's application held that estoppel per rem judicatum and issue estoppel raised by the appellant did not apply as an enquiry could not be equated with a court. The land administrator's D statutory duty was to arrive at a valuation in regard to the respondent's subject land so that compensation for the acquisition of the subject land could be paid to the respondent. With respect to the issue of unjust enrichment, raised by the appellant, it was held that the issue was best determined at the trial for the relief sought here was for damages for the tort of trespass, which was different and E distinct from the award of compensation at the enquiry. The learned judge also considered the appellant's contention that the respondent had approbated and reprobated when he had chosen a course of action by not objecting to the award and as such he could not now pursue this other course of action. His Lordship decided that this argument was fatally flawed because it failed to distinguish F between an enquiry to determine compensation for the acquisition of the subject land and the trial based upon the tort of trespass to the subject land which occurred before the legal acquisition. This issue would best be determined at trial. In the upshot, the learned judge held that the appellant's contentions did not render the respondent's claim against the appellant on the G face of it obviously unsustainable, nor frivolous, vexatious, scandalous or an abuse of process of the court.

[7] Before this court, several points were taken by the appellant's counsel H indicating their position which they adopted in this appeal. We begin with the appellant's case which was directed on the argument that the respondent's suit suffered from a multiplicity of claims. A submission was made for the appellant that the respondent's own claim at the second enquiry was based on his own land valuation report (exh CSK6) which comprised two parts:

I (a) a claim for RM2,000 per sqmt for a land area of 560 sqmt (the report rounded off the area of 558 sqmt to 560 sqmt) totalling RM1,120,000 based on the land value in 2014; and

(b) a claim for 'Late Payment Charges' for ten years between the period of 2005–2014 for a sum of RM568,512 on an average land value (from 2005–2015) of RM1,269 per sqmt at the rate of 8%pa.

[8] It is a pertinent point to mention that, based on his land valuation report, in 2005, the value of the subject land was RM538 per sqmt. The respondent as earlier mentioned, upon being awarded compensation in the sum of RM1,116,000, accepted the said award without protest which acceptance was shown in evidence before the court in Form H dated 14 May 2015 (exh LCK2). The respondent failed to proceed with any steps under s 37 of the Act in particular sub-s (1)(b) thereof where the respondent could make an objection to the amount of the compensation. Under s 38 of the Act, the respondent could make an objection pursuant to s 37 by a written application in Form N to the land administrator requiring that he refers the matter to the court for its determination. We were pressed by learned counsel for the respondent on this point that the issue of multiplicity of claims was a non-starter contending that whether the land administrator could award damages for trespass and whether the interest for late payment was made by the land administrator were surely issues which ought to be decided at trial.

[9] The Act under s 30(a) allows an interested person to receive payment of the amount awarded under protest as to the sufficiency of such amount. The respondent in this appeal, in our opinion, ought to have availed himself to the said provision, that being the specific mode open to him in the land acquisition proceedings. It is also clear in s 30(b) of the Act that any person who has received any payment of any amount awarded otherwise than under protest is precluded from requiring that his claim be referred to the court under s 37. The learned judge, obviously erred when His Lordship distinguished between the instant action and the decisions in *Tan Yoke Kwee & Ors v Sistem Lingkaran Lebuhraya Sdn Bhd & Ors* [2009] MLJU 215; [2010] 2 CLJ 653 and *Lembaga Lebuhraya Malaysia v Cahaya Baru Development Bhd* [2009] 5 MLJ 14; [2010] 4 CLJ 419 on the facts but omitted from taking into consideration the legal principles laid down in both cases which are relevant to the present action.

[10] The decision in *Tan Yoke Kwee & Ors* highlights the necessity to pursue any claim for compensation by adhering to procedure as prescribed under the Act, and not by way of any action extraneous to the Act. A significant point which ought to be emphasised is that in *Tan Yoke Kwee & Ors*, the plaintiffs whose lands were subjected to acquisition proceedings in accordance with the procedure prescribed by the Act, filed their originating summons seeking amongst others, an order that the defendants were liable to pay each plaintiff the sum of RM350,000 as well as to expeditiously make available and allot to each of them a suitable piece of land. The defendants applied to strike out the plaintiffs' application, inter alia, on the ground that if the plaintiffs were

unhappy with the compensation awarded, the procedure they should have adopted was to appeal by way of an application pursuant to ss 36–38 of the Act. This was what the court in its decision had to say:

> [13] The grievance of the plaintiffs whose lands had been compulsorily acquired clearly relates to the amount of compensation that should be payable to them. That being so, the procedure that should have been followed by these plaintiffs must necessarily be that as prescribed under ss 36, 37 and 38 of the Act. Their claim by way of originating summons was clearly misconceived.

[11] Similarly, so far as the case of *Lembaga Lebuhraya Malaysia* is concerned, we had endeavoured to scrutinise the appeal records of the instant appeal and such scrutiny had yielded the result that despite the appellant's argument in the court below that the declaratory relief sought by the respondent should not have been granted because an alternative remedy existed by way of land reference proceedings prescribed under the Act, the learned judge in this regard failed to give sufficient and proper consideration to the appellant's submission that the court in the said case had also held that where the respondent sought a declaratory relief that the appellant was not entitled to lodge a Form N under the Act and that the said Form N lodged by the appellant was wrong, invalid and of no legal effect, the declaratory reliefs sought by the respondent should not have been granted because an alternative remedy by way of land reference existed (supplementary appeal record at pp 14–15). We are also mindful of the principle stated in the same case that the Act should be construed according to the intention expressed therein and that the function of the court was to interpret an Act of Parliament and to give effect to the will of the Legislature expressed therein.

[12] In amplification of the above principle, reference in this connection must also be made to *Manggai v Government of Sarawak & Anor* [1970] 2 MLJ 41 in which the Federal Court, having stated the trite law on the necessity to follow a specific statutory remedy provided for under the law, at p 41 held that:

> ... as the applicant had not pursued the alternative remedy available to him of an appeal to the Native Court of Appeal, the High Court was right in refusing to make the declaration.

The Federal Court there also applied the decision of Asquith LJ in the case of *Wilkinson v Barking Corporation* [1948] 1 KB 721 who explained the law as follows:

> ... It is undoubtedly good law that where a statute creates a right and, in plain language, gives a specific remedy or appoints a specific tribunal for its enforcement, a party seeking to enforce the right must resort to that remedy or that tribunal, and not to others;

and referred with approval the principle laid down by the House of Lords in *Pasmore and others v The Oswaldtwistle Urban District Council* [1898] AC 387 wherein Earl of Halsbury LC said:

> ... The principle that where a specific remedy is given by a statute, it thereby deprives the person who insists upon a remedy of any other form of remedy than that given by the statute, is one which is very familiar and which runs through the law.

[13] In the instant case, had the respondent enforced his right in accordance with the provisions of the Act, his case would have been settled one way or another as the statutory remedy available under the Act better suited the case. In *Metal Industry Employees Union v Registrar of Trade Unions & Ors* [1976] 1 MLJ 220, the Federal Court, in emphasising that the statutory remedy better suited the case and would satisfactorily dispose of the dispute, at p 222 said:

> The matter would have been settled one way or another if an appeal had been made to the Minister under s 17 of the said Ordinance instead of pursuing the matter in courts ...

[14] We were also told, in the course of hearing this appeal, that in *Land Executive Committee of Federal Territory v Syarikat Harper Gilfillan Berhad* [1981] 1 MLJ 234, the respondents did not appeal against the decision of the Director of Lands and Mines pursuant to s 418 of the National Land Code but applied by originating summons for a declaration that they were not required to apply for a change of category of land use prior to the application for amalgamation and subdivision. The Federal Court held that on a proper reading of s 418 of the National Land Code it was clear that Parliament by using plain and unambiguous language intended the right to be exclusive of any other mode of enforcing it. The court therefore had no jurisdiction to entertain the claim sought by the declaration.

[15] Similarly, the High Court in *Lokmanaal Hakim Ramli & Ors v Hj Ismail Ishak & Ors* [1992] MLJU 110; [1992] 2 CLJ Rep 795 dismissed the plaintiffs' claim as the remedy of declaration was not open to them and the plaintiffs being aggrieved parties had the right to appeal under s 29(a) of the Small Estates (Distribution) Act 1955 and they should have appealed in the above case under the said section. Thus, a catenation of the pronouncements of legal principles in the above cases relating to a specific remedy or tribunal provided for under an Act of Parliament clearly points to the requirement on the respondent in the case before us, to avail himself to the procedure of a land reference prescribed under the Act. Since the respondent failed to have recourse to such procedure, the remedy sought for in this action was not open to him, is plainly misconceived, and the court has no jurisdiction to entertain the action. It is clear that the respondent's claim is unsustainable.

[16] To illustrate further on the same point, in yet another decision, Lim Beng Choon J, delivering the judgment in *Ng Chee Keong & Ors v Lembaga Letrik Negara & Anor* [1990] MLJU 7; [1991] 3 CLJ Rep 323, and we think that the learned judge was right on this point, held:

> [2] As the said portion was compulsorily acquired and ownership had been transferred to D1 and duly registered the plaintiffs' cause of action *which was anchored solely on trespass cannot in any way be sustainable*. (Emphasis added.)

At p 326 (CLJ) His Lordship clearly said:

> However that may be, three factors are indisputable and they are that:
>
> (i) the cause of action of the plaintiffs are solely anchored on the tortious act of trespassing on the part of the defendants on the portion of the land in question;
>
> (ii) the portion of the land had been duly and compulsorily acquired by the government under the Land Acquisition Act 1960; and
>
> (iii) ts a result of the compulsory acquisition under the Land Acquisition Act, ownership of the portion of land in question was duly transferred to the 1st defendant and duly registered vide title HS(D) 841 Lot 405.
>
> *It is beyond any doubt, based on the indisputable factors adumbrated above, that the plaintiff's cause of action anchored solely on trespass cannot in any way be sustainable.* (Emphasis added.)

[17] In *Ng Chee Keong & Ors*, the plaintiffs (executors of a deceased estate) alleged in their statement of claim that in or around the period 1960–1962 the defendants entered into a portion of the land belonging to the estate of Lim Oa (deceased). Prior to the entry, the first defendant had entered into negotiations with the family of Lim Oa for the acquisition of that portion of the land. However, no agreement was executed and no compensation was paid. The plaintiff alleged that the defendant's entry into the land and the building of the access road upon the said portion therefore constituted a trespass of the deceased's property. Steps were apparently taken by the government to acquire that area of the land under the Act and the acquisition was duly *gazetted* in the *Warta* Kerajaan Negeri Pahang dated 6 June 1972 and compensation of RM5112.50 was paid as a result of which the ownership of the said subdivided portion was transferred to the first defendant. The above case undoubtedly showed a foursquare position and was indeed in point with the present appeal, and therefore a claim for trespass in the present action could not in any way be sustainable. However, the learned judge in the court below plainly did not refer to *Ng Chee Keong & Ors*, which was cited by learned counsel for the appellant in the course of his submission.

[18] Based on the actual facts pertaining to the present case gleaned from the

respondent's statement of claim and affidavit in reply, in particular his own admission that he had written several letters to all defendants to enquire into the status of acquisition of the subject land but of no avail, we are of the opinion that the respondent was fully aware of the construction of the highway part of which runs across the subject land and the alleged trespass on the same by the appellant since 2005, yet he only wrote to the appellant seeking compensation on 21 June 2013 stating that the subject land had been acquired by the government. The said letter significantly made no mention of a trespass or reserving rights to a claim of trespass. It took the respondent another 2 1/2 years before he finally commenced this action on 18 December 2015 against the first and second defendants and the appellant qua the third defendant in the court below. When the subject land was acquired on 1 December 2014 and at the second enquiry to determine the appropriate market value of the subject land on the date of the publication in the *Gazette* of the declaration made under s 8 of the Act which was 1 December 2014, the respondent relied on his land valuation report which claimed for late payment charges for ten years at the rate of 8%pa in addition to a claim for compensation for the acquisition of the subject land at the market value of RM2,000 per sqmt. Having taken this course of action, the respondent followed it through by accepting the award of compensation for the acquisition of the subject land unconditionally or without protest.

[19] Clearly, in regard to the question of compensation, a finality had been reached by the respondent's own choice. We thus have no reasons to disagree with learned counsel for the appellant when he contended forcefully that it was indeed multiplicity to thereafter file a separate civil action premised on the tortious act of trespassing on the subject land for the same ten year time frame as was in *Ng Chee Keong & Ors*. The learned judge obviously failed to sufficiently address the issue of the ten year overlapping claim although in essence, that is precisely what the respondent claims in the present action.

[20] The valuation report was prepared on behalf of the respondent that was patently indicative of his position. To reiterate, under the heading 'Compensation', the report has two subheadings:

Market Value

560.00 sq metres@

RM2,000.00 per sq metre RM1,120,000.00

Late Payment Charges

560.00 sq metres @ RM1,269.00 per sq metres RM568,512.00

@8% annum @ 10 years

A Now, under s 32(1) of the Act, late payment charges are allowed to be awarded. Subsection (1) provides that when the amount of any compensation awarded under the Act in respect of any land is not paid or deposited on or before the due date, the land administrator shall pay the amount awarded with late payment charges thereon at the rate of 8%pa from the due date until the time
B of such payment or deposit. Further, s 48 of the Act empowers the court to award late payment charges at the same rate stated above if it is of the opinion that the land administrator ought to have awarded as compensation in excess of the sum which the land administrator did award as compensation.

C

[21] The respondent, we observe, has purported to claim a sum calculated backward in time from 2005 by using the said 8% late payment charges. By claiming from 2005 its ten year compensation or late payment charges, the respondent's own position is that the acquisition of the subject land was in
D 2005. We refer to the key words in para 15.00 of the valuation report which expressly states that the respondent is 'claiming interest at 8% to be paid to the landowner from the date of acquisition until the date the total compensation is paid'. He took part in the process at the second enquiry and all matters raised therein including the valuation report were within his personal knowledge. The
E respondent has made a claim for the late payment charges for the ten year time frame at the second enquiry and his claim for trespass plainly falls squarely within the said ten year period. The respondent's action without doubt suffers from a multiplicity of claims. The respondent ought to have proceeded under ss 30, 37 and 38 of the Act if he was aggrieved by the decision of the land
F administrator in respect of the award.

[22] The acquisition of the subject land was made pursuant to the exercise of the statutory power of the state authority in 2005. However, since the respondent could not be traced and no award was given within the prescribed
G two year period from the date of the publication in the *Gazette* under s 8(1) of the Act, the declaration under sub-s (1) of s 8 thereof lapsed. The state authority subsequently published the second declaration under s 8(1) of the Act in 2014. The construction of the highway commenced after the acquisition of the subject land in 2005 and was completed in 2009. It is indeed an
H irrefragable fact that part of the highway runs across the subject land. Thus, any entry to the subject land by the appellant was in the exercise of their statutory right pursuant to the said acquisition. The appellant could not therefore be said to have trespassed on the subject land. Now that the process of the acquisition was completed following the second declaration under s 8 of the Act in 2014
I and the award of compensation had already been made based on the respondent's valuation report, he should have followed through all aspects of the statutory process under the Act including requiring by way of an application under ss 37 and 38 that the land administrator refers the matter to the court for its determination.

[23] The respondent did not sue for trespass after the first declaration under s 8 of the Act was *gazetted* in 2005. When the second enquiry was held on 25 May 2015 following the second declaration under s 8 of the Act, he participated thereat and accepted the award without any statutory protest which he was allowed to do so under s 30 of the Act. However, the respondent thereafter sued the appellant for trespass. This suit is clearly an abuse of the court process. The respondent resorted to the present action despite the availability of the process by way of land reference under s 38 of the Act which is the procedure that the respondent should have necessarily followed.

[24] It would be useful to remember that the respondent had taken a particular position at the second enquiry before the land administrator. He participated at the said enquiry submitting at the same time the valuation report which contained a claim for compensation for the period of ten years. It is beyond any dispute that he accepted the award without any protestation which he is allowed to do under s 30 of the Act. He took one clear stance at the enquiry and did not apply for the case to be referred to the High Court by way of a land reference under ss 37 and 38 of the Act. As could be gleaned from his valuation report, the valuation for the subject land was grossly higher than what he would have received in 2005 based on his own position in 2005. Based on his valuation report, the value of the subject land was RM2,000 per sqmt and he was awarded a sum of RM1,116,000. This was significantly and substantially more than the sum he would have been awarded based on his own valuation report which was RM301,280 on the basis of the value of RM538 per sqmt. The respondent had already received more than what would be legally due under the Act. We stress this point as his own valuation report in para 15.00 states very clearly that the date of the acquisition was in 2005 which is a clear admission that the respondent has taken 2005 as the date of the acquisition of the subject land. His claim in the present action could thus lead to a situation of unjust enrichment.

[25] Based on the above actual facts, the respondent could be said to be taking a different stance before the court in this action and under the law he was not allowed to blow hot and cold in the attitude that he adopts. The learned judge failed to consider that the respondent's claim for trespass and the claim he had already made at the second enquiry arose from the same facts. He should accordingly be estopped from commencing this action. The respondent having made a choice at the second enquiry could be treated as having made an election from which position he should not be allowed to abandon. He had taken a benefit arising out of the course of conduct which he had pursued earlier and with which his subsequent conduct was inconsistent with his election. The respondent should not be at liberty to approbate and reprobate having taken a particular position. Reference in this connection could be made to the decision of this court in *Kelana Megah Development Sdn Bhd v Kerajaan*

Negeri Johor and another appeal [2016] MLJU 1649; [2016] 8 CLJ 804 wherein it was held at p 814 (emphasis added to highlight the similarities):

> [20] The appellant's conduct as described hereinbefore is plainly inconsistent and contradictory. The alleged rights pursued and relief sought through the present action are remarkably inconsistent with and contradict the right pursued and relief sought in the land references. ... The appellant's conduct, as it were, could thus be properly described as blowing hot and cold that while the appellant approved the acquisitions they also rejected it. The appellant is not permitted to approbate and reprobate on the issue of the acquisition of the seven plots of land.
>
> ...
>
> [22] Further, in *Cheah Theam Kheng v City Centre Sdn Bhd (In Liquidation) & Other Appeals* [2012] 1 MLJ 761; [2012] 2 CLJ 16, this court cited with approval the English case of *Express Newspaper plc v News (UK) Ltd And Others* [1990] 3 All ER 376 wherein it was stated:
>
> > In the words of Sir Nicolas Browne-Wilkinson VC in *Express Newspaper plc v News (UK) Ltd and others* [1990] 3 All ER 376, at pp 383–384:
> >
> > > There is a principle of law of general application that it is no possible to approbate and reprobate. That means you are not allowed to blow hot and cold in the attitude that you adopt. A man cannot adopt two inconsistent attitudes towards another: he must elect between them and, *having elected to adopt one stance, cannot thereafter be permitted to go back and adopt an inconsistent stance*. (Emphasis added.)
>
> [23] The decision of this court in *Tenaga Nasional Bhd v Irham Niaga Sdn Bhd & Anor* [2011] 1 MLJ 752; [2011] 1 CLJ 491 is also instructive. We reproduce the relevant excerpts below:
>
> > Estoppel by election is related to the principle that a person may not approbate and reprobate (*Lissenden v CAV Bosch, Limited* [1940] AC 412 p 478; [1940] 1 All ER 425 at p 429 (HL)). Thus, a person having a choice between two courses of conduct is to be treated as having made an election from which he cannot resile. But the person will not be regarded as having so elected unless he has taken a benefit under or a raising out of the course of conduct which he has first pursued and with which his subsequent conduct is inconsistent with his election. (*Banque des Marchands de Moscou (Koupetschesky) v Kindersley and another* [1951] Ch 112 at pp 119–120; [1950] 2 All ER 549 at p 552 (CA); *Ex parte Robertson, In re Morton* (1875) LR 20 Eq 733; and *Evans v Bartlam*) ...
> >
> > If person is entitled to one two inconsistent rights, as opposed to having a choice between two alternative remedies (*United Australia, Limited v Barclays Bank, Limited* [1941] AC 1 at p 29; [1940] 4 All ER 20 at p 37 (HL)) and, with an open mind and with full knowledge he does an unequivocal act showing that he has chosen one, he cannot afterwards pursue the other (*Slough Estates Ltd v Slough Borough Council and another (No 2)* [1969] 2 Ch 305; [1969] 2 All ER 988 (CA)).

[26] It ought to highlighted that when the respondent wrote to the first defendant on 21 June 2013 seeking compensation, he made no mention of trespass or reserving his rights to a claim of trespass. He merely mentioned 'PENGAMBILAN TANAH' in his letter. In our judgment, the respondent, as we have indicated above, had chosen his own course of action, he subsequently therefore is precluded from pursuing the other course of action attracting in consequence the application of the legal principle that does not permit a person to both approbate and reprobate. The law is well settled that recourse should be had to the summary process under O 18 r 19 only in plain and obvious cases. The burden to prove that the case is plainly and obviously unsustainable rests with the appellant. We remind ourselves that the recourse to this summary process involved the exercise of drastic power. Lee Hun Hoe CJ (Borneo) precisely explained the principle in the case of *Lee Nyan Choi v Voon Noon* [1979] 2 MLJ 28 at p 29 in the following words:

> The power to dismiss an action summarily without permitting a party to proceed to trial is a drastic power and should be exercised with utmost caution. The power of summary procedure should only be resorted to in plain and obvious cases.

[27] In the case before us, the appellant seeks to strike out the respondent's claim under O 18 r 19(1)(b) and (d) of the Rules of Court 2012. We have indicated earlier that the respondent's claim is an abuse of the process of the court which is the ground upon which an applicant is permitted to rely pursuant to sub-r (1)(d) of O 18 r 19 of the Rules of Court 2012. The learned judge, so far as it concerns the issue of jurisdiction, correctly pointed out that the court had an inherent jurisdiction to prevent abuse of its process (*Raja Zainal Abidin bin Raja Haji Tachik & Ors v British-American Life & General Insurance Bhd* [1993] 3 MLJ 16 (SC)). The court has given a wide interpretation to the term 'abuse of process of the court' and that being the case, the categories of conduct rendering a claim of an abuse of process are not closed and will depend on all relevant circumstances of the case. The Singapore Court of Appeal in *Gabriel Peter & Partners (suing as a firm) v Wee Chong Jin & Ors* [1998] 1 SLR 374 at p 384 had explained the law in language that merits recollection:

> (4) The term, 'abuse of the process of the Court', in O 18 r 19(1)(d), had been given a wide interpretation by the courts. It includes considerations of public policy and interests of justice. This term signifies that the process of the court must be used bone fide and properly and must not be abused. The court will prevent the improper use of its machinery. It will prevent the judicial process from being used as a means of vexation and oppression in the process of litigation. The categories of conduct rendering a claim frivolous, vexatious or an abuse of process are not closed and will depend on all relevant circumstances of the case. A type of conduct which has been judicially acknowledged as an abuse of process is the bringing of an action for a collateral purpose ... if an action was not brought bona fide for the purpose of obtaining relief but for some other ulterior or collateral purpose, it might be struck

A out as an abuse of the process of the court.

B **[28]** Each of the factors to which we have alluded, taken as whole, sufficiently convince us that the respondent's claim in this case fell within the category of conduct which we could safely say had rendered it an abuse of process of the court. The respondent in reality does not have justification to found his claim on trespass against the appellant in view of his subsequent conduct which is glaringly inconsistent with his earlier election. He had also failed to avail himself to the procedures in ss 30, 37 and 38 of the Act, being the specific modes under the law which he was required to follow if he was not satisfied with the award of the land administrator. With deference to the learned judge, His Lordship erred in not allowing the appellant's application to strike out the respondent's claim. In the end and for the reasons that we have indicated, the instant application under consideration of this court in this appeal is a thoroughly meritorious appeal and we think that this is an appropriate case for this court to formally interfere with the decision of the learned judge. Upon subjecting the evidence to our anxious scrutiny, we hold that the learned judge ought to have exercised its powers under O 18 r 19(1)(b) and (d) of the Rules of Court 2012, and the court's inherent jurisdiction to strike out the respondent's claim. We accordingly set aside the order of the High Court dated 16 February 2017 and allow the notice of application in encl 45 dated 2 December 2016 in prayer (1). This appeal is allowed with costs of RM10,000 subject to the payment of allocatur fee.

Appeal allowed; decision of the High Court set aside; and encl 45 allowed.

Reported by Ashok Kumar